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No. 87-854

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JERRY COLANESE, *et al.*,
Petitioners,

v.

NEW PRAIRIE CLASSROOM TEACHERS ASSOCIATION,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Indiana

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RESPONDENT'S BRIEF IN OPPOSITION

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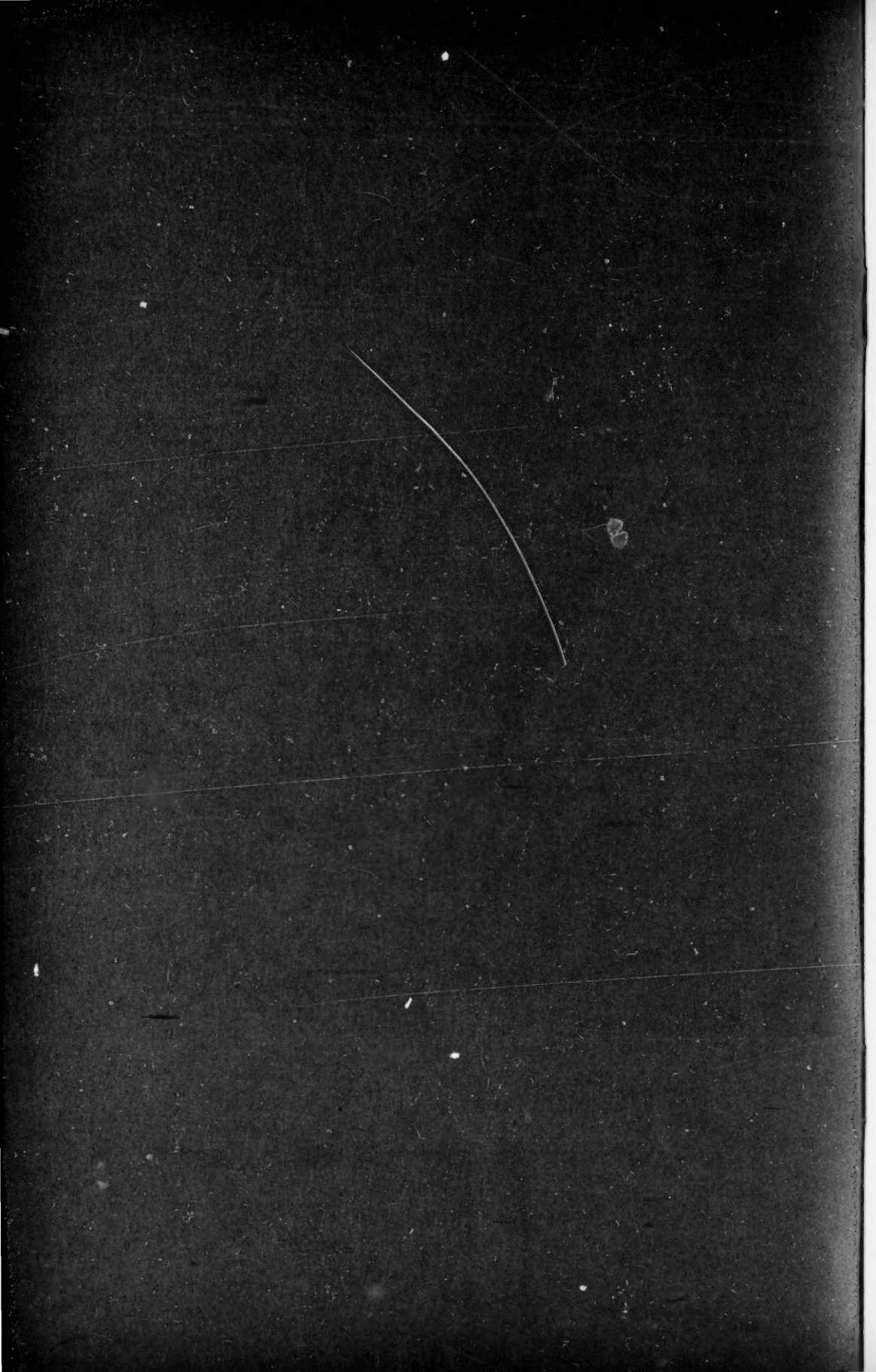

QUESTION PRESENTED

Whether this Court should review the unpublished decision of the Court of Appeals of Indiana, which held that there was sufficient evidence in the record to justify the representation [*i.e.*, agency] fees that petitioners were ordered to pay to their exclusive collective bargaining representative, respondent New Prairie Classroom Teachers Association.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent New Prairie Classroom Teachers Association submits that the Petition for a Writ of Certiorari should be denied, and files this brief in opposition to the Petition. At the outset, it should be noted that the Petition is in all relevant respects identical to two Petitions for Writs of Certiorari to the Indiana Court of Appeals that were denied by the Court during its 1986 Term: *Stewart v. New Prairie Classroom Teachers Association*, No. 86-554, *cert. denied*, —— U.S. ——, 107 S. Ct. 1370 (March 9, 1987), and *Abels v. Monroe County Education Association*, No. 86-603, *cert. denied*, —— U.S. ——, 107 S. Ct. 1347 (March 2, 1987). Both the questions presented for review and the supporting legal arguments in the current Petition are taken virtually verbatim from those two previous Petitions. Indeed, of the 42 individual petitioners in this case, 33 also were petitioners in No. 86-554, and the unpublished opinion of the Indiana Court of Appeals in this case merely referred back to the

opinions it issued in the two prior cases.[1] Accordingly, there is no reason for the Court to treat this Petition for a Writ of Certiorari any differently than the two Petitions that were denied last Term.

STATEMENT OF THE CASE

Since at least 1974, respondent New Prairie Classroom Teachers Association ("NPCTA") has been recognized, pursuant to Indiana's Certificated Educational Employee Bargaining Act, Ind. Code § 20-7.5-1-1 *et seq.*, as the exclusive representative for a bargaining unit consisting of the teachers employed by the New Prairie United School Corporation ("School Corporation"). Petitioners are forty-two teachers who were employed by the School Corporation during the 1981-82 and 1982-83 school years, and therefore were members of the NPCTA bargaining unit.

In its capacity as exclusive representative, NPCTA entered into a collective bargaining agreement with the School Corporation covering the period from July 1, 1980 through June 30, 1983. As permitted by Indiana law, that agreement included a representation fee provision[2]

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[1] Indeed, the only difference between this case and the prior decision in *Stewart* is the school year at issue. Specifically, the instant case involves a challenge to representation fees charged by respondent New Prairie Classroom Teachers Association for *the 1981-82 and 1982-83 school years*; the *Stewart* case involved an identical challenge to representation fees charged by the New Prairie Classroom Teachers Association for *the 1980-81 school year*.

[2] *See New Prairie Classroom Teachers Association v. Stewart*, 460 N.E.2d 149 (Ind. App. 1983), *transfer denied* (Indiana Supreme Court, Oct. 18, 1983) ("The agency shop agreement between NPCTA and the school board as to payment of representation fees to NPCTA was authorized by law, constitutional, and binding upon non-member teachers"); *Fort Wayne Education Association, Inc. v. Goetz*, 443 N.E.2d 364 (Ind. App. 1982), *transfer dismissed* (Indiana Supreme Court, May 13, 1983).

In their Petition for a Writ of Certiorari, petitioners do not—and could not—challenge the basic constitutionality of collecting repre-

—*i.e.*, a provision that required bargaining unit employees who chose not to join NPCTA "to pay a representation fee to the Association, including the Indiana State Teachers Association and the National Education Association." Appendix to Petition ("App.") 6a (noting that clause in collective bargaining agreement was same as clause at issue in *Stewart, supra*, No. 86-554). The Indiana State Teachers Association ("ISTA") and the National Education Association ("NEA") are, respectively, NPCTA's state and national parent organizations. As part of its affiliation relationship with ISTA and NEA, NPCTA has a "unified" membership structure, which means that a teacher may not become a member of NPCTA without also joining, and paying dues to, ISTA and NEA. App. 6a. The collective bargaining agreement further provided that no feepayer "should be forced to contribute financial support to political or ideological activities of the Association unrelated to collective bargaining, contract administration, and grievance adjustment or unrelated to its duties as exclusive bargaining representative." App. 6a.

This representation fee provision was not of the classic variety. Unlike the typical arrangement—pursuant to which the fee automatically is deducted from the nonmember employee's salary, or payment is made a condition of employment for which a noncomplying employee may be terminated—NPCTA could enforce this contractual obligation only by suing to recover the amount of any unpaid fees.[3] Accordingly, when petitioners refused to pay their representation fees for the 1981-82 and 1982-83 school years, NPCTA filed this lawsuit against them in the La Porte Superior Court.

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sentation fees from nonmember employees. *See Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

[3] The Indiana courts have held that it would violate state law to make payment of a representation fee a condition of employment enforceable by termination. *See Anderson Federation of Teachers, Local 519 v. Alexander*, 416 N.E.2d 1327 (Ind. App. 1981).

A bench trial was held on July 31 and August 1, 1985. Six witnesses testified on behalf of NPCTA. These witnesses described in detail, with appropriate documentation, the activities engaged in by NPCTA, ISTA, and NEA during the 1981-82 and 1982-83 school years; the amounts expended for each of these activities; and the specific relationship between these expenditures and the duties performed by NPCTA as the exclusive representative.[4] In addition to presenting evidence regarding the expenditures made by NPCTA, ISTA, and NEA for activities that were *included* in computing the representation fees that were sought from petitioners, NPCTA also presented evidence regarding those expenditures that it had excluded from the representation fees because it did not consider them to be sufficiently related to collective bargaining.

After reviewing the evidence presented at trial, and the briefs that were filed by the parties, the trial court issued its opinion on October 10, 1985. The court began by declaring that:

> Defendants in this suit, non-members of NPCTA who are also members of the bargaining unit represented by NPCTA, are liable for a fair share representation fee for school years 1981-82 and 1982-83. The proper amount of the representation fee includes all costs related to collective bargaining, contract administration, grievance adjustment and the performance of the duties of an exclusive bargaining

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[4] These duties included, *inter alia*, bargaining with the School Corporation over "salary, wages, hours, and salary and wage related fringe benefits," Ind. Code § 20-7.5-1-4; engaging in discussions with the School Corporation concerning "working conditions, other than [salary, wages, hours, and fringe benefits]; curriculum development and revision; textbook selection; teaching methods; selection, assignment, or promotion of personnel; student discipline; expulsion or supervision of students; pupil-teacher ratio; class size or budget appropriations," *id.* § 20-7.5-1-5; and processing grievances against the School Corporation pursuant to the negotiated grievance arbitration provision, *id.* § 20-7.5-1-4.

> representative. The representation fee shall not include any expenses for political and ideological activities unrelated to the duties of the exclusive bargaining representative, the cost of organizing nonmembers and certain legal expenses not properly charged to non-members.
>
> The scope of the fair share representation fee encompasses numerous statutory duties with their attendant responsibilities and activities. NPCTA's affiliation with ISTA and NEA provides necessary and vital resources without which NPCTA could not meet its legal obligations without charging exorbitant fees to both members and nonmembers. App. 6a.

The court then held that each petitioner was liable to NPCTA for two representation fees, one covering the 1981-82 school year and the other covering the 1982-83 school year. Specifically, the court found:

> By a preponderance of the evidence, Plaintiff [*i.e.*, NPCTA] has established it is entitled to recover of each of the Defendants in this suit the following:
>
> a. For school year 1981-82, NPCTA is entitled to collect a representation fee in the amount of $184.41 per defendant. This amount includes $19.86 for NPCTA, $126.15 for ISTA, and $38.40 for NEA.
>
> b. For school year 1982-83, NPCTA is entitled to collect $201.22 per defendant. This amount includes $19.09 for NPCTA, $139.20 for ISTA, and $42.93 for NEA. App. 6a-7a.

Petitioners appealed these monetary judgments to the Court of Appeals of Indiana, raising several issues that were consolidated by that court into one question: whether the trial court erred in its calculation of the representation fee due NPCTA. *See* App. 2a.[5] Relying

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[5] The Court of Appeals also decided another question that was presented to that court by petitioners—namely, "whether the trial court erred in denying [petitioners'] counterclaim and their request for injunctive relief." App. 2a. On this issue, the Court of Appeals

on its prior decisions in *New Prairie Classroom Teachers Association v. Stewart*, 487 N.E.2d 1324 (Ind. App. 1986), *transfer denied* (Indiana Supreme Court, July 7, 1986), *cert. denied*, —— U.S. ——, 107 S. Ct. 1370 (1987), and *Abels v. Monroe County Education Association*, 489 N.E.2d 533 (Ind. App. 1986), *transfer denied* (Indiana Supreme Court, July 14, 1986), *cert. denied*, —— U.S. ——, 107 S. Ct. 1347 (1987), the Court of Appeals unequivocally rejected the arguments presented to that court by petitioners and answered this question in the negative. In fact, the Court of Appeals in this case expressly stated that "[t]hose decisions [*i.e.*, *Stewart* and *Abels*] control the outcome of the . . . allegation of error" that was presented in this appeal. App. 2a.

In those prior decisions, the Court of Appeals had set forth the applicable standard for determining whether expenses are chargeable to employees who refuse to join the exclusive representative by quoting at length from this Court's decision in *Ellis v. Railway Clerks*, 466 U.S. 435 (1984):

> [T]he test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.

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concluded that petitioners' "counterclaim was properly denied" by the trial court, and that "[t]he trial court also was justified in finding that the injunctive relief prayed for by [petitioners] was inappropriate." App. 3a. Petitioners do not challenge either of these rulings before this Court.

Stewart, supra, 487 N.E.2d at 1328, and *Abels, supra*, 489 N.E.2d at 539 (both quoting *Ellis, supra*, 466 U.S. at 448).

Furthermore, consistent with prior decisions of this Court and the Indiana courts, the Court of Appeals in both *Stewart* and *Abels* had expressly stated that "the exclusive representative bears the burden of establishing, by a preponderance of the evidence, what proportion of their expenditures were properly assessable against non-members." *Abels, supra*, 489 N.E.2d at 539; *Stewart, supra*, 487 N.E.2d at 1329 (the exclusive representative "must prove the proportion of [its] total expenditures which were chargeable to objecting employees"). *See also Fort Wayne Education Association, Inc. v. Goetz*, 443 N.E.2d 364, 373 (Ind. App. 1982), *transfer dismissed* (Indiana Supreme Court, May 13, 1983) ("the burden [is] upon the Association to show nonpolitical use of the funds").

In each of these prior cases, moreover, the Court of Appeals applied the foregoing standards to the record previously developed in the trial court. In *Stewart*, for example, the Court of Appeals concluded that NPCTA had met its burden of proof, and that there was sufficient "evidence of probative value to support the judgment" of the trial court. *See* 487 N.E.2d at 1329. Similarly, in *Abels*, the Court of Appeals specifically rejected the argument that certain expenditures that were made by the exclusive representative and its affiliated organizations, and that were included in the representation fees, were not properly chargeable to objecting feepayers. To the contrary, the court concluded in that case that "[t]he trial court's determination of the proper fair share representation fee [was] supported by sufficient evidence contained in the record." 489 N.E.2d at 542.

Although the Court of Appeals in the instant case did not directly state that the trial court's calculation of the representation fees owed by petitioners was supported by

the record evidence developed during the two-day trial, that was clearly its intent when it relied on the prior decisions in *Stewart* and *Abels* as "control[ling] the outcome" of petitioners' claims. App. 2a. Indeed, after citing to those prior decisions, the Court of Appeals in this case expressly concluded that "[t]he trial court's calculation of damages [*i.e.*, the amount of lawfully chargeable representation fees] was proper." App. 2a.

The same is true with regard to the second issue raised by petitioners in their Petition for a Writ of Certiorari—namely, whether their representation fees should include payments to ISTA and NEA. On this issue, the Court of Appeals also cited to its prior decisions in *Stewart* and *Abels*, both of which had found sufficient evidence in the record to support a trial court judgment that certain payments to ISTA and NEA were properly chargeable to objecting feepayers. For example, in *Stewart*—which concerned representation fees payable to NPCTA for the 1980-81 school year—the Court of Appeals first observed "that NPCTA had been elected exclusive representative in its affiliated status" with ISTA and NEA, and that "the collective bargaining agreement [itself] provides . . . that the representation fee shall include payments to ISTA and NEA." 487 N.E.2d at 1327. The court then rejected the contention that ISTA and NEA "allegedly provided no collective bargaining services to the teachers during the term for which payment is being sought." *Id.* To the contrary, and on the basis of the evidence presented at trial, the court found that ISTA and NEA provided employees in the bargaining unit with numerous services that properly could be charged to objecting feepayers. As the court put it:

> [O]ne purpose of these payments [to ISTA and NEA] was to secure the availability of services from these organizations. As the United States Supreme Court has recognized,
>
> > "[t]he tasks of negotiating and administering a collective-bargaining agreement and represent-

> ing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money. *See* [*Machinists v.*] *Street*, 367 U.S. [740, 760 (1961)]. The services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel, may be required."

Abood v. Detroit Bd. of Education (1977), 431 U.S. 209, 221. Were NPCTA to hire local lawyers, negotiators or researchers, there would be little dispute that they could charge a fair share of the cost to the non-member teachers. Instead, they have chosen to pay a fixed, yearly amount for the continued availability of such services. The teachers cannot force NPCTA to abandon this approach, nor should they be allowed to benefit from the services of ISTA or NEA without paying a fair share of the cost of their continued availability. 487 N.E.2d at 1327.

The Court of Appeals in *Stewart* then turned to the evidence presented in the trial court to identify certain of the specific collective bargaining services that were provided by ISTA and NEA. Dealing first with a challenge to "the expenditures of ISTA and NEA for lobbying governmental agencies other than the school board," 487 N.E.2d at 1329, the court stated that it "agree[d] with [the United States Courts of Appeals for both the Third and Ninth Circuits] that lobbying efforts germane to the union's duties as an exclusive representative are chargeable to objecting employees." *Id.* (citing *Robinson v. State of New Jersey*, 741 F.2d 598 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985), and *Champion v. State of California*, 738 F.2d 1082 (9th Cir. 1984), *cert. denied*, 469 U.S. 1229 (1985)). In addition to these lobbying expenses, the court found that:

> There was evidence at trial that ISTA and NEA, through Unified Services (UniServ), provided other more direct assistance to NPCTA in performing its duties as the teachers' exclusive representative. They

> provided training and assistance in the area of collective bargaining, as well as other areas. Under [Ind. Code §] 20-7.5-1-5, NPCTA is required to discuss with the school board such topics as curriculum development and textbook selection, and UniServ provided its expertise in these areas. 487 N.E.2d at 1330.

The Court of Appeals thus concluded in *Stewart* that:

> There was sufficient evidence that the payments to ISTA and NEA were "necessarily or reasonably incurred for the purpose of performing [NPCTA's] duties [as] an exclusive representative." *Ellis, supra*, [466 U.S. at 448]. The trial court did not err in ordering the teachers to reimburse ISTA and NEA. 487 N.E.2d at 1330.[6]

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[6] The Court of Appeals in *Abels* applied a similar line of reasoning to reach a similar conclusion. Specifically, the court found that ISTA and NEA provided employees in the bargaining unit with numerous services that properly could be charged to objecting fee-payers. As the court explained:

> State and national organizations, particularly in the area of education, have traditionally supplied these and other services to assist their local affiliates in carrying out collective bargaining responsibilities. Such a network spreads the costs of acquiring these services, thus, facilitating collective bargaining activities even for the smaller bargaining units. If a local organization were required to employ its own staff of lawyers, expert negotiators, economists, and researchers, as the [petitioners'] argument necessarily suggests, the costs of collective bargaining could quickly become prohibitive. We have found no support for such a result. 489 N.E.2d at 537.

With specific regard to the services provided to the exclusive representative by ISTA and NEA, the Court of Appeals stated:

> As we noted above, these are numerous services which an exclusive representative would need to employ in order to effectively fulfill its collective bargaining responsibilities. MCEA has chosen to pay fixed yearly fees to ISTA and NEA in return for continuous availability of a wide range of services. Certainly MCEA could have determined that another method of acquiring these collective bargaining services was more advantageous. However, it did not. We perceive no basis which would

The evidence presented by NPCTA to the trial court in this case was of the same kind, and the same degree, as the evidence in the record in *Stewart*. *See supra* at 4-5. It therefore was not surprising that the Court of Appeals in this case simply relied on its prior ruling in *Stewart* (as well as its previous ruling in *Abels*) to affirm the judgment of the trial court in an unpublished opinion. App. 2a. After issuance of that opinion, moreover, the Court of Appeals denied petitioners' motion for rehearing. The Supreme Court of Indiana subsequently refused to review the decision of the Court of Appeals.

REASONS FOR DENYING THE WRIT

As already noted, *supra* at 1-2, the Petition for a Writ of Certiorari in this case is virtually identical to two Petitions that were denied by the Court only a year ago, during its 1986 Term. *See Stewart v. New Prairie Classroom Teachers Association*, No. 86-554, *cert. denied*, —— U.S. ——, 107 S. Ct. 1370 (March 9, 1987), and *Abels v. Monroe County Education Association*, No. 86-603, *cert. denied*, —— U.S. ——, 107 S. Ct. 1347 (March 2, 1987). Perhaps most important, the decision of the Court of Appeals of Indiana in this case was based entirely on the opinions issued by that court in those two prior cases. Indeed, the Court of Appeals expressly stated that "[t]hose decisions [*i.e.*, *Stewart* and *Abels*] control[led] the outcome" in this case. Accordingly, we respectfully submit that, inasmuch as the Court already

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permit non-members to force MCEA to abandon the approach it has selected as most effective, short of an election to oust MCEA as the bargaining unit's exclusive representative. Therefore, assuming that the fair share representation fees sought for ISTA and NEA are not otherwise objectionable, non-members may be required to pay them. 489 N.E.2d at 538.

The court in *Abels* then turned directly to the "challenge [to] the amount of fair share representation fee[s] destined for ISTA and NEA," concluding that the challenge was "merely an invitation to reweigh the evidence" which, the court held, "we will not do." 489 N.E.2d at 542.

has denied Petitions for Writ of Certiorari in both *Stewart* and *Abels*, there is absolutely no reason for the Court to treat this Petition any differently than the Petitions in *Stewart* and *Abels* that were denied last Term.

Nonetheless, in the interests of completeness, we offer the following response to the instant Petition. Specifically, petitioners challenge the ruling of the Court of Appeals in this case on two grounds: they claim initially that the method used by the court to calculate the amount of the representation fees was incorrect; and they claim, in addition, that the court erred when it included in the representation fee amounts to be paid to ISTA and NEA. As we shall demonstrate, petitioners' first claim is based upon a mischaracterization of the decision of the Court of Appeals, and their second claim relates to conclusions reached by that court with regard to the sufficiency of the evidence presented in the trial court. Neither of these claims presents a question that warrants further review by this Court.

I. THE CONCLUSION OF THE COURT OF APPEALS OF INDIANA THAT NPCTA HAD PRESENTED SUFFICIENT EVIDENCE OF ITS CHARGEABLE EXPENDITURES TO JUSTIFY THE REPRESENTATION FEES AWARDED BY THE TRIAL COURT DOES NOT WARRANT REVIEW BY THIS COURT

The first of the two Questions Presented in the Petition for Certiorari is as follows:

> WHEN A UNION SUES A DISSENTING NONMEMBER TO COLLECT AN UNPAID REPRESENTATION FEE:
>
> I. IS THE MEASURE OF DAMAGES REQUIRED BY THE FIRST AMENDMENT:
>
> A. A Pro Rata Share Of The Proven Costs of Collective Bargaining; Or
>
> B. Arbitrarily Set Union Dues Less A Union-Determined Rebate Amount?

The clear implication to be drawn from this question is that the Court of Appeals based its affirmance of the representation fees awarded by the trial court on a "dues-less-rebate" approach. This is not in fact so. Consistent with the decisions of this Court and the courts of Indiana, the Court of Appeals expressly relied upon prior decisions that had required "NPCTA, ISTA, and NEA [to] prove the proportion of their total expenditures which were chargeable to objecting employees." *Stewart, supra*, 487 N.E.2d at 1329. *See Abels, supra*, 489 N.E.2d at 539 ("the exclusive representative bears the burden of establishing, by a preponderance of the evidence, what proportion of their expenditures were properly assessable against non-members").

This Court's decisions establish that it is constitutional to require bargaining unit employees, over their objection, to support union activities that are related to collective bargaining. *See, e.g., Chicago Teachers Union v. Hudson*, 475 U.S. ——, 106 S. Ct. 1066, 1069 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435, 455-56 (1984); *Abood v. Detroit Board of Education*, 431 U.S. 209, 217-32 (1977). It is equally well-established that, once a representation fee is challenged by a nonmember employee, the union has the burden of proving the appropriate fee amount: " 'Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion.' " *Abood, supra*, 431 U.S. at 239-40 n.40 (quoting *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963)), *quoted in Hudson, supra*, 106 S. Ct. at 1075.

In *Hudson, supra*, this Court provided further guidance with regard to the nature of this burden. The Court in *Hudson* stated that a union could not simply "identif[y] the amount that it admittedly had expended for purposes that did not benefit dissenting nonmembers," and then

charge nonmembers a fee based upon the remaining percentage of total expenditures. 106 S. Ct. at 1076. Rather, a union that seeks to collect representation fees from nonmembers has the burden of "identifying the expenditures for collective bargaining and contract administration that had been provided for the benefit of nonmembers as well as members—and for which nonmembers as well as members can fairly be charged a fee." *Id.*[7]

Despite petitioners' protestations to the contrary, *see* Petition at 13-14, this is precisely the burden of proof that NPCTA was required to, and did in fact, meet in this case. As described more fully in the Statement of the Case, *supra* at 6-11, the Court of Appeals expressly incorporated its prior decisions in *Stewart* and *Abels*, App. 2a, which held that NPCTA and its affiliated organizations "must prove the proportion of their total expenditures which were chargeable to objecting employees," 487 N.E.2d at 1329; *see* 489 N.E.2d at 539 ("the exclusive representative bears the burden of establishing, by a preponderance of the evidence, what proportion of their expenditures were properly assessable

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[7] For purposes of argument, we assume in this brief that this requirement applies to the collection of representation fees by exclusive representatives in Indiana, and demonstrate that NPCTA in fact complied with this requirement. It is important to note, however, that the Court in *Hudson* was dealing with the totally different situation in which a union seeks to collect and expend representation fees *before* an impartial determination has been made as to the allowable amount of the fee. In such circumstances, the Court indicated that "[b]asic considerations of fairness, as well as concern for the First Amendment rights at stake, . . . dictate that the potential objectors be given sufficient information to guage the propriety of the union's fee." 106 S. Ct. at 1076. This rationale is not applicable in Indiana: there is no risk to a nonmember employee's First Amendment rights, inasmuch as state law prohibits the involuntary collection of representation fees from public school teachers, by payroll deduction or otherwise, unless and until there has been a final court judgment against the teachers awarding a specified representation fee to their exclusive representative.

against non-members"). And it was based on this standard that the court concluded that there was sufficient evidence in the record to support the trial court's judgment that NPCTA was entitled to representation fees from the petitioners. Moreover, this was not a new approach for the Indiana courts, for in the leading case upholding the imposition of representation fees under Indiana law, the Court of Appeals previously had concluded that "the burden [is] upon the Association to show non-political use of the funds." *Goetz*, *supra*, 443 N.E.2d at 373. In short, the holding of the Court of Appeals is fully consistent with this Court's agency fee decisions, including its decision in *Hudson*.

Petitioners' assertion that the Court of Appeals based the representation fee on "Union Dues Less A Union-Determined Rebate Amount," Petition at i, rather than on proof of NPCTA's chargeable expenditures, reflects a total misunderstanding of the role that membership dues played in the court's calculation of the fee. The dues were not used by the court to alter in any way the requirement that "NPCTA, ISTA, and NEA must prove the proportion of their total expenditures which were chargeable to objecting employees." App. 2a; 487 N.E.2d at 1329. It was only *after* that requirement had been satisfied that dues were used as a benchmark against which to calculate the allowable representation fees. Simply stated, once sufficient evidence had been introduced to establish the percentage of the total expenditures of NPCTA, ISTA, and NEA that "were 'necessarily or reasonably incurred for the purpose of performing [NPCTA's] duties [as] an exclusive representative.'" 487 N.E.2d at 1330 (quoting *Ellis*, *supra*, 466 U.S. at 448), the court applied that percentage to the dues charged to NPCTA members to determine the amount of the representation fees.[8]

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[8] A similar approach was approved in the decision of the Massachusetts Labor Relations Commission in *Dailey v. Woburn Teachers*

This use of dues as the final step in the representation fee calculation process finds ample support in the decisions of this Court, *see, e.g., Abood, supra*, 431 U.S. at 238 (citing *Machinists v. Street*, 367 U.S. 740, 774-75 (1961), for remedy of "restitution of a fraction of union dues paid equal to the fraction of total union expenditures that were made for political purposes"), and is in accord with the approach taken in various statutes authorizing the collection of representation fees, *see e.g.*, 45 U.S.C. § 152, Eleventh (Railway Labor Act provision linking involuntary membership fees to dues); Mich. Comp. Laws § 423.210(1)(c) (providing that representation fees for Michigan public employees may be "equivalent to the amount of dues uniformly required of members"); N.J.S.A. 34:13A-5.5(b) (providing that representation fees for New Jersey public employees may not "exceed 85% of the regular membership dues").

Petitioners contend that *Hudson* supports their position, but they are mistaken. There is nothing in that decision that disallows a cross-reference to dues for purposes of calculation *after* a union has, as NPCTA did

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Association, 13 MLC 1555 (No. MUPL-2850 Apr. 3, 1987), which is cited and quoted at length in the Petition at 14-16. In that decision, the state commission concluded that an exclusive representative could not simply subtract a "rebatable amount" of nonchargeable expenditures from the total dues charged to members. Rather, the commission held that an exclusive representative could follow one of two alternative means of establishing the amount of its representation fee, the second of which would allow the exclusive representative to prove the amount of its chargeable expenditures and then apply that percentage to the dues charged to members. *See* 13 MLC at 1564 (allowing an exclusive representative to prove its representation fees by proving the "particular proportion of [union] expenses [that] were permissible," and then combining that percentage with evidence of membership dues for that year). This is similar, if not identical to, the approach followed by the trial court in the instant case. Thus, notwithstanding petitioners' assertions to the contrary, the decision in this case is fully consistent with the decision of the Massachusetts Labor Relations Commission in *Dailey*.

here, proven the percentage of its total expenditures that is chargeable to nonmembers. Although a union's total expenditures may not in each and every year be precisely the same as its total dues income, the Court in *Hudson* obviously intended to allow for this type of minimal discrepancy when it reaffirmed that " '[a]bsolute precision' in the calculation of the charge to nonmembers cannot be 'expected or required.' " 106 S. Ct. at 1076 n.18 (quoting *Allen, supra*, 373 U.S. at 122, and *Abood, supra*, 431 U.S. at 239-40 n.40). Indeed, both the Court of Appeals and the Supreme Court of Indiana specifically considered the propriety of NPCTA's representation fees in light of *Hudson*, and summarily denied petitioners' claims. *See* App. 2a, 9a, 10a.[9]

In short, the first Question Presented in the Petition for Certiorari is based on a mischaracterization of the decision of the Court of Appeals of Indiana, and therefore cannot properly provide the basis for review by this Court.

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[9] Petitioners also seek to demonstrate that the representation fees were excessive by comparing total expenditurs by NPCTA, ISTA, and NEA for the relevant school years with the total "number of people represented and the number of people required to pay the costs of such representation." *See* Petition at 5-6. Even assuming, *arguendo*, that petitioners correctly state the dollars expended and employees represented in any given year, the resulting variations in representation fees may be explained by the annual fluctuations that are inherent in any union's membership and budgetary processes. Despite these fluctuations, unions almost invariably choose to assess a flat rate of dues on their members, rather than constantly changing their dues structure to account for annual variations in membership or in expenditures. The same administrative latitude surely must be available for representation fees. *Cf. Hudson, supra*, 106 S. Ct. at 1076 n.18 ("the Union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year").